87-1550

No. 87 -

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DERR,
Petitioner,

v.

KAWASAKI KISEN K.K.,
Respondent.

THOMAS ROBERTSON,
Petitioner,

v.

TOKAI SHOSEN K.K.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where cargo was stowed aboard a ship in a negligent manner by a foreign stevedore, and during unloading in a U.S. port, the cargo fell from its place of stowage as a result of the improper manner of stowage, and struck petitioner-longshoreman, who brought suit against the ship under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905(b), did not the Third Circuit err in ruling (in conflict with decisions of the Fifth and Ninth Circuits), that the shipowner's duty of reasonable care owed to longshoremen did not extend to an unsafe condition resulting from the manner in which the cargo had been stowed?

2. Whether the court below erred in holding that the custom in the maritime industry that the crew of a ship inspects the manner in which cargo is stowed aboard

the ship at the time of loading, did not impose a duty on the ship to exercise reasonable care with respect to any unsafe conditions which such an inspection would disclose?

3. Did not the court below err in holding (in conflict with decisions of the Fourth, Fifth and Ninth Circuits) that a ship's duty of reasonable care owed to longshoremen with respect to the "work spaces" of a ship, as that term was used in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981), did not include an unsafe condition in the cargo hold resulting from the unsafe manner in which cargo was stowed?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioners, William Derr and Thomas Robertson, respectfully pray that a Writ of Certiorari issue to review two Judgments and the Opinion of the United States

Court of Appeals for the Third Circuit entered on December 15, 1987, holding that the shipowner's duty of reasonable care owed to longshoremen did not extend to unsafe conditions resulting from the manner in which cargo had been stowed aboard a ship in a foreign port prior to the ship's arrival at the port of discharge in the United States, and further holding that a shipowner has no duty to inspect the manner in which cargo has been stowed aboard its ship in order to discover and remedy unsafe conditions which would create a danger to longshoremen engaged in unloading that cargo, and in support thereof represent as follows:

OPINIONS BELOW

The within two cases were tried separately in the District Court and consolidated on appeal for purposes of argument and disposition. The Opinion of the United States Court of Appeals for the

Third Circuit on the consolidated appeals is officially reported at 835 F.2d 490 (3rd Cir. 1987), and is reproduced in the Appendix hereto (1a). The Bench Opinion of the United States District Court for the Eastern District of Pennsylvania in Derr v. Kawasaki Kisen K. K. is not officially reported, and is reproduced in the Appendix hereto (21a). The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania in Robertson v. Tokai Shosen K.K. is officially reported at 655 F.Supp. 152 (E.D. Pa. 1987), and is reproduced in the Appendix hereto (80a).

JURISDICTION

The Judgments of the United States Court of Appeals for the Third Circuit in both appeals were entered on December 15, 1987 (17a, 18a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, Section 5(b), 33 U.S.C. Section 905 (b)

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy

> provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The Legislative History of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, as set forth in House Report No. 92-1441, is reprinted in 1972 U.S. Cong. & Adm. News, Vol. 3, at page 4698. The portion of that Legislative History relating to the adoption of Section 5(b) of the Act and the elimination of the unseaworthiness remedy, which appears at 1972 U.S. Cong. & Adm. News, pages 4701 through 4705, is reproduced in the Appendix hereto (92a).

STATEMENT OF THE CASE

Both the within actions originated as suits brought by longshoremen to recover damages for personal injuries which they suffered while working aboard ships in navigable waters of the United States. In each case, District Court jurisdiction was based on 28 U.S.C., Section 1332, diversity of citizenship, and 28 U.S.C., Section 1331, an action arising under the laws of the United States, to wit, Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C., Section 905(b).

The essential operative facts in each case are the same.

In both cases, petitioners were longshoremen engaged in discharging cargo from ocean going ships who were injured when cargo fell from a stow of cargo in the ship's hold and struck them (3a). The cargo which fell and injured the

petitioners had been loaded on the ships by independent stevedores in foreign ports prior to the arrival of the ships at the ports of discharge in the United States (3a).

In both cases, there was evidence that, during the course of the voyage from the foreign loading ports to the discharge ports in the United States, the cargo which fell and struck the petitioners had shifted or moved from the position in which it originally had been stowed (3a). Petitioners presented evidence that the cause of this shifting or movement of the cargo was the failure to have the cargo properly secured at the time it was loaded.

At trial, petitioners offered expert testimony as to how the cargo should have been secured in conformity with proper maritime practice, and that if the cargo had been so secured then it would not have

shifted during the ocean voyage (3a). Petitioners also presented evidence that, as a result of the shifting or movement of the cargo during the ocean voyage, the cargo stow was not in a stable condition when the discharging operations commenced, and that this lack of stability was a substantial factor in causing the cargo to fall from the stow and injure them.

In Derr v. Kawasaki Kisen K.K., the petitioner was discharging packages of lumber which were approximately three feet high, three or four feet wide and of various lengths, when one of these packages of lumber fell from the cargo stow and landed on his foot. There was evidence that no shoring or dunnage was used in the stow to secure the lumber in place and prevent it from moving.

In Derr, petitioner presented expert testimony that shoring or dunnage should have been used to secure the cargo. This

testimony was confirmed by testimony from the Captain of the ship who stated that such shoring should have been used (63a-64a).

The Captain of the ship further testified that he thought that someone from the ship's crew was assigned to observe the loading of the cargo on the ship (41a), but when petitioner sought to offer expert testimony that there was a world wide custom in the maritime industry for a deck officer of the ship to be present to observe cargo loading operations, the Trial Judge struck the testimony (8a-9a, 25a).

In Robertson v. Tokai Shosen, K.K., petitioner was struck by a coil of steel rod which fell from a cargo stow shortly after he had entered the cargo hold. Petitioner offered expert testimony that the cargo stow of coils of steel rod had not been lashed and secured properly.

There also was evidence that the cargo hold had been inspected by the ship's Chief Officer prior to the start of cargo operations and testimony from a surveyor employed on behalf of the ship that he had observed and photographed the stow prior to the start of the discharging operation, and that he saw that the stow had "moved" (15a-16a).

In both Derr and Robertson, the respective trial judges granted the shipowners' Rule 50 motions for a directed verdict at the conclusion of the petitioners' cases, holding that a shipowner had no duty to inspect how cargo was loaded aboard its ship so as to discover and remedy unsafe conditions which might endanger discharging longshoremen. In so ruling, neither trial judge suggested that his decision was in any way based on any failure on the part of the petitioners' stevedore employers to perform their work

in a proper manner. Rather, the trial judges held that the shipowners owed no duty to discharging longshoremen with respect to unsafe conditions arising from the manner in which cargo was stowed.

The Court of appeals for the Third Circuit affirmed, holding as follows:

(1) A shipowner has no duty to inspect the manner in which cargo is loaded in a foreign port to discover unsafe conditions which might endanger discharging longshoremen -- specifically rejecting, and in clear and unequivocal conflict with -- the contrary decision of the Ninth Circuit in Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982) (10a-11a).

(2) The fact that there may be a custom or practice in the maritime industry to observe cargo loading operations does not impose upon shipowners a duty to

exercise reasonable care with respect to any unsafe conditions which would be disclosed by such observations (9a) -- a holding which is in conflict with this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981).

(3) When this Court held in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 81 L.Ed.2d 1 (1981), that the shipowner's duty of reasonable care extended to the "condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operation," the term "work space" was limited to the "physical work space" of the ship rather than an unsafe condition of the space," i.e., the cargo hold, -- resulting from the manner in which cargo had been stowed in the hold (13a).

(4) The ship's duty to intervene with respect to unsafe conditions is

limited to unsafe conditions of its equipment, i.e., there is no duty to intervene to remedy an unsafe condition created by cargo negligently loaded by a foreign stevedore (14a).

(5) Since a shipowner has no duty to inspect cargo stowage operations, there is no duty to warn of any unsafe conditions in the stowage, unless the shipowner actually knows of the unsafe condition and it is not open and obvious (15a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The decision below is in conflict with the Ninth Circuit's decision in Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), the Fifth Circuit's decision in Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981), and the principles set forth in the legislative history of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

In Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), a case decided shortly after this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S., 156, 81 L.Ed.2d 1 (1981), the Ninth Circuit held that the shipowner's duty of reasonable care extended to dangerous conditions created by foreign stevedores "of which the vessel could, in the exercise of reasonable care, have corrected or warned of," see 651 F.2d at 1304.

Similarly, in Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981), a case which was tried before this Court's decision in Scindia, see 449 F.Supp. 1016 (S.D. Ga. 1978), but in which the appeal was not decided until after Scindia, with the appellate decision being based on Scindia, the Court affirmed a verdict in favor of an injured longshoreman in which the jury found that "the shipowner was negligent with regard to the method of stowing the cargo", see 656 F.2d at 117.[1]

The Third Circuit, in its Opinion in the instant cases, did not specifically consider the Fifth Circuit's decision in Lemon. However, it did address the Ninth Circuit's decision in Turner, and rejected it, stating "We cannot accept the Turner analysis" (11a). Since Lemon, like

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1. In Lemon, as in Turner and the instant two cases, the cargo had been loaded in a foreign port by a foreign stevedore, see 449 F.Supp. at 1019.

Turner, holds that a shipowner may be held responsible for an unsafe condition created by a foreign loading stevedore, it is clear that the Third Circuit, in the decision below, has placed itself in clear and unequivocal conflict with two long-standing decisions from the Fifth and Ninth Circuits respectively.

In enacting the 1972 amendments to the Longshoremen's and Harbor workers' Compensation Act, Congress expressed particular concern that the negligence remedy which it was creating be applied uniformly throughout the different ports of the United States. This intent is specifically set forth in the legislative history (105a):

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located.

The decision below, if allowed to stand, will result in the law which will

be applied in ports such as Philadelphia, Pennsylvania, Camden and Gloucester, New Jersey, and Wilmington, Delaware, being different from the law which will be applied in ports such as New Orleans, Louisiana, Mobile, Alabama, San Francisco, California, and Portland, Oregon. In view of the Congressional mandate that the longshoreman's negligence remedy be applied uniformly throughout the United States, there is a compelling necessity for review by this Court to resolve the conflict in Circuits created by the decision below.

The decision below is in error in several respects, but its most significant flaw lies in the failure of the court below to distinguish between unsafe conditions caused or created during the cargo operations performed by the injured longshoreman's stevedore-employer, -- conditions which the longshoreman's stevedore

employer presumably is in the best position to prevent, -- and unsafe conditions created by others, which the injured longshoreman's stevedore-employer is powerless to prevent.

The negligence remedy which Congress enacted in the 1972 Act was to be based on shore-side principles of negligence law. The legislative history states (98a-100a):

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, . . .
>
> . . . .
>
> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition. (Emphasis supplied)

Under land-side law, contrary to the holding of the Third Circuit in the instant case, the employer of an independent contractor, who would be in a position comparable to that of a shipowner who has hired an independent stevedore to load cargo aboard a ship, is not insulated from responsibility for inspecting the work of that contractor upon completion so as to provide for the safety of those who subsequently may suffer injury if that work has not been performed in a safe and proper manner. The applicable principle is set forth in Section 412 of the Restatement of Torts, Second, as follow:

> Section 412. Failure to Inspect Work of Contractor After Completion
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to

ascertain whether the land or chattel is in reasonably safe condition after the contractor's work is completed. (Emphasis supplied)

It would be totally unrealistic and far-fetched to even suggest that the crew of a ship does not inspect the manner in which the cargo the ship is carrying has been stowed. Shipping companies are in the business of carrying cargo. They are legally responsible for the condition of that cargo on delivery. No competent ship's Captain would ever consider going to sea without having first assured himself that the cargo in his ship was properly stowed and secured, as the safety and stability of the ship on the ocean voyage is dependent upon this. Nor would any shipowner employ a Captain who would not take care to see that the cargo the ship is carrying is carefully secured so as not to be damaged on arrival and subject the vessel to a cargo damage claim. In this regard, the comments of the

authors of the Article "Proof of Third-Party's Negligence In Action Under the Longshore and Harbor Workers' Compensation Act", 44 Am Jur Proof of Facts 2d 147, 187 (1986), are apropos:

> The most common, and most useful, custom that can be proved in Section 905(b) suits is the inspection by the ship's crew and officers of the loading (as opposed to discharging) operation. Any knowledgeable expert witness will testify to this proposition in general; it cannot be denied in the context of conventional general cargo vessels. Thus, one's own witness' testimony on this point can be corroborated by cross-examination of the deck officer or captain, who will not likely admit that he does not customarily keep a watch on loading." (Emphasis supplied)

In the legislative history of the 1972 Act, Congress emphasized that the purpose of the elimination of the unseaworthiness remedy was to relieve shipowners from liability for unsafe conditions caused or created by the injured longshoreman's stevedore-employer, not those caused or created by some stevedore

in another port who has no responsibility for the safety of the injured longshoreman. This is emphasized in the legislative history, which repeatedly states that it is only from liability for conditions attributable to stevedores subject to the Longshoremen's Compensation Act, i.e., the injured longshoreman's employer, that the shipowner is being relieved. Thus, the legislative history states (99a-100a):

> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. Crumedy v. The J. H. Fisser, 358 U.S. 423, Albanese v. Matts, 382 U.S. 283, Skibinski v. Waterman SS Corp., 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A. N. G. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman SS Corp, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, Alaska

SS Co. v. Peterson, 347 U.S. 396, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence. (Emphasis supplied)

The holding of the court below that a shipowner has no responsibility for unsafe conditions created by loading stevedores is without foundation in the legislative history, and is contrary to the specific mandate of Congress that longshoremen have a negligence remedy based on land-side principles of negligence law. The decision below, if allowed to stand, will place longshoremen at the mercy of foreign stevedores, and will defeat the expressed purpose of Congress in enacting a negligence remedy of encouraging vessel safety. The Ninth Circuit correctly analyzed the situation in Turner (651 F.2d at 1304):

> . . . imposing a duty on the Owner or Time-Charterer or both in this

case should further the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore. We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoremen to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy. We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of. (Emphasis supplied)

II.

The holding below that the custom in the maritime industry of inspecting the manner in which cargo is stowed imposed no duty of inspection on a shipowner is in conflict with this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S.156, 81 L.Ed.2d 1 (1981), and raises an issue of importance with respect to the interpretation of the shipowner's duty of reasonable care.

This Court, in Scindia, supra, in discussing the shipowner's duty of inspection, distinguished between conditions existing at the start of cargo operations, with respect to which the shipowner "was chargeable with knowledge," see 451 U.S. at 178, 68 L.Ed.2d at 19, and conditions arising after the start of cargo operations. Scindia held that there was no "general duty" of inspection with respect to conditions developing after the start of cargo operations, with the important proviso that such duty of inspection might arise by virtue of contract provision, positive law, or custom to the contrary.

Thus, this Court noted, 451 U.S. at 172, 68 L.Ed.2d at 15:

> We are of the view that absent contract provision, positive law, or custom to the contrary -- none of which has been cited to us in this case -- the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. (Emphasis supplied)

In the instant cases, the unsafe conditions of the cargo hold existed prior to the start of cargo operations by the plaintiffs' stevedore employers, and thus fell within those categories of unsafe conditions with which the shipowner was "chargeable with knowledge." Nonetheless, and in an abundance of caution, petitioner in Derr v. Kawasaki Kisen K.K. offered expert testimony that there was a custom in the maritime industry to inspect the manner in which cargo is loaded and secured. The trial judge excluded this testimony and, on appeal, the Third

Circuit held that the fact that the ship's officers may customarily observe cargo operations "cannot be used to reimpose the general duty to supervise the stevedore" (9A). In so holding, the Third Circuit has failed to understand the purpose of the offered testimony and is refusing to follow the direction of this Court in Scindia that custom is a relevant consideration in determining the vessel's duty of inspection, see Scindia, 451 U.S. at 172, 68 L.Ed.2d at 15.

The proffered evidence with respect to proof of custom was not designed to "reimpose" any general duty of supervision of a foreign stevedore by the shipowner, even assuming that such a duty ever existed; rather, it was offered to prove the vessel's knowledge, or at least its opportunity to obtain knowledge, of unsafe conditions arising from the manner in which cargo was stowed. The shipowner's

duty of care arises from its knowledge of an unsafe condition. The issue is not whether the vessel is to supervise the conduct of the foreign stevedore, but, rather, is the shipowner under a duty to use reasonable care to discover unsafe conditions, whether created by a foreign stevedore or otherwise. Simply put, if an unsafe condition is capable of being discovered by reasonable inspection, and if there is a custom in the maritime industry to make such an inspection, then, under basic principles of tort law, the shipowner should be held to a duty of reasonable care with respect to any unsafe conditions which such a reasonable inspection would disclose. The evidence of custom which petitioner Derr sought to present was a relevant consideration in determining the nature of the conditions of which the shipowner should have been aware and should have taken corrective

action.

The role of the custom in the maritime industry of inspecting the manner in which cargo is loaded is a matter of importance in shipboard operations. The Third Circuit's failure to permit this evidence of custom presents an issue of importance which warrants consideration by this Court to insure that the lower courts will correctly apply the rulings made in the Scindia decision.

III.

The holding below that the term "work space," as used by this Court in Scindia, referred only to the physical condition of the work space, and not to an unsafe condition existing in the work space, is an incorrect reading of the Scindia decision, and is in conflict with decisions of the Fourth, Fifth and Ninth Circuits.

In Scindia, supra, this Court held that the ship's duty of reasonable care extended to the "work spaces" of the ship, see Scindia, supra, 45 U.S. at 167, 81 L.Ed.2d at 12:

> The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operation; . . . (Emphasis supplied)

The holds of a cargo ship -- the place where longshoremen perform their work -- quite clearly fall within the definition of a "work space" of a ship. Should cargo in that work space be in an unstable condition and in danger of falling -- as in the instant two cases -- there would be an unsafe condition of that

"work space" within the common understanding of that term. The court below, however, thought otherwise, holding that when this Court used the phrase "work space" in Scindia, the meaning of this phrase was limited to the "physical work space," and that this Court intended a distinction between a defect in the physical structure of a cargo hold and an unsafe condition resulting from the manner in which cargo was stowed in the hold (13a). In so holding, the Third Circuit placed itself in conflict not only with the decision of the Ninth Circuit in Turner, supra, and the decision of the Fifth Circuit in Lemon, supra, but also with the decision of the Fifth Circuit in Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984), and the decision of the Fourth Circuit in Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982),

In Harris v. Flota Mercante Grancolombiana, S.A., supra, the Fifth Circuit sustained a recovery by a longshoreman who was injured when bags fell from a cargo stow and landed on him. While there was no proof in Harris that the cargo had been loaded by an independent stevedore in a foreign port, the Court sustained a recovery by the longshoreman on proof of knowledge by the vessel's mate of the unsafe condition of the stow. In Harris, as in the instant case, there was no claim of any "physical" defect in the cargo hold; rather, as in the instant case, the defect was in the "condition" of the cargo stow.

Similarly, in Gill v. Hango Ship-Owners/AB, supra, the Fourth Circuit sustained a theory of recovery on behalf of a longshoreman who alleged that he was injured by the improper manner in which cargo had been stowed in the hold of a

ship which required an unreasonably dangerous method of discharge. In Gill, as in Harris, there was no suggestion that there was any "physical" defect in the hold. The defect was in the manner of cargo stowage.

The foregoing two decisions, as well as the decisions in Turner and Lemon discussed in Point I of this Petition, all were decided following this Court's decision in Scindia. To the extent that the decision below makes a distinction between a defect in the "physical" work space and other types of defects, it is in conflict with these decisions -- a conflict which should be resolved by this Court in order to insure uniformity in the application of the longshoreman's negligence remedy under Section 5(b) of the Act.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiori should issue to review the Opinion and Judgments of the court below.

Respectfully submitted

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No. 87 -

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DERR,
Petitioner,

v.

KAWASAKI KISEN K.K.,
Respondent.

THOMAS ROBERTSON,
Petitioner,

v.

TOKAI SHOSEN K.K.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1772

WILLIAM DERR,
Appellant

v.

KAWASAKI KISEN K.K.

On Appeal from the United States District
Court For the Eastern District
of Pennsylvania
(D.C. Civil No. 85-5250)

No. 87-1031

THOMAS ROBERTSON,
Appellant

v.

TOKAI SHOSEN K.K.

On Appeal from the United States District
Court For the Eastern District
of Pennsylvania
(D.C. Civil No. 86-2620)

Argued September 9, 1987

Before: SLOVITER and STAPLETON,
Circuit Judges, and
FISHER, *District Judge**

(Opinion filed December 15, 1987)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act (the Act) to eliminate any liability of a vessel for injuries to longshoremen during cargo operations unless caused

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* Hon. Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

by the negligence of the vessel. This case presents, for the first time in this court since the Supreme Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the issue of what liability, if any, a vessel has for injuries to longshoremen caused by cargo improperly loaded by a foreign stevedore.

I.

Background

Appellants William Derr and Thomas Robertson were longshoremen injured in separate but similar accidents in which cargo fell upon them during the unloading of the respective appellees' vessels. Derr, who was discharging packages of lumber, was injured when a package fell and struck his foot. Robertson was injured when a coil of steel rod fell from the stow, striking him on the head and back. In both cases, the cargo had been loaded by independent stevedores in foreign ports. Derr and Robertson were employed by independent stevedores responsible for the discharge of the cargo. The longshoremen filed suits in federal court alleging that the shipowners were liable under section 5(b) of the Act, 33 U.S.C. § 905(b) (1982 & Supp. II 1984), on the ground that their injuries were caused by the vessels' negligence.

Each case was tried to a jury. The juries heard testimony suggesting that the ships had encountered bad weather during passage. In *Derr*, it was stated that the cargo had shifted during the voyage, meaning that considerable movement of cargo had occurred. In *Robertson*, there was testimony that there "may have been some movement but not what we [in the shipping business] call shifting," which is more serious. App. at 166-67. The appellants' expert witness testified that the cargo would probably not have moved or shifted had it been properly secured by the foreign longshoremen.

Derr testified that he was aware of the shift in the cargo prior to the accident, and Robertson presented evidence that the movement of the wire coils was apparent. Both plaintiffs stated that it was not unusual to encounter shifted cargo.

The district court in each case granted a directed verdict for the vessel, holding that under the Supreme Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the vessel had no duty to inspect or supervise the handling of cargo, and no duty to warn of a dangerous cargo condition which is open and obvious or of which it is unaware. *Derr v. Kawasaki Kisen K.K.*, No. 85-5250, bench op., App. at 106-09 (E.D. Pa. Dec. 2, 1986); *Robertson v. Tokai Shosen K.K.*, 655 F. Supp. 152, 154-55 (E.D. Pa. 1987). The cases having been consolidated for purposes of appeal, Derr and Robertson contend that the district courts erred as a matter of law.

II.

The Legislative Scheme and Scindia

Until 1972, a tortured liability triangle was played out on the wharves and piers of America. A longshoreman injured in a cargo operation could receive compensation from the stevedore employer, and also prevail in an action against the vessel on either a negligence or breach of the warranty of seaworthiness theory. To show unseaworthiness, the longshoreman had only to prove that there was an unsafe, injurious condition on the vessel; the fact that the condition was the fault of the stevedore did not protect the vessel, although the vessel might in turn recover from the stevedore for breach of warranty to handle the cargo operation safely. *Scindia*, 451 U.S. at 164-65.

As Judge Friendly pointed out in *Kakavas v. Flota Oceanica Brasileira, S.A.*, 789 F.2d 112, 117 (2d Cir.),

cert. denied, 107 S. Ct. 186 (1986), this liability scheme produced "an anomalous and intolerable situation." A considerable part of the longshoreman's award ended up in the hands of his lawyer with much of the remainder going to the stevedore's insurers in repayment of the workmen's compensation received. That compensation was inadequate, and the stevedore, instead of being exposed only to the workmen's compensation award, ended up paying the awards made against the ship as well. The system served neither deterrence nor compensation very well. H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4702-03 (House Report). *See generally* Note, *Shipowners Owe Longshoremen No Duty to Discover Dangers Arising Within the Confines of the Cargo Operation*, 56 Tul. L. Rev. 1421, 1422-27 (1982) (hereinafter *Tulane Note*).

Congress "radically changed this scheme of things," *Scindia*, 451 U.S. at 165, by amending the Act in 1972 to increase the longshoremen's workmen's compensation, *see* House Report at 4700-01, and by adding subsection (b) to section 5 of the Act. That subsection provides, in pertinent part:

> In the event of injury to a [longshoreman] caused by the negligence of a vessel, then such [longshoreman] . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer [the stevedore] shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

33 U.S.C. § 905(b).

The intention of Congress to eliminate the vessel's liability without fault was express and unambiguous. Congress believed that it was fairer, and fully consistent with the goal of promoting safety, for the vessel's liability

> to be predicated on negligence, rather than the no-fault concept of seaworthiness. . . .
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

House Report at 4703.

Congress was less clear in defining the vessel's statutory negligence and its resulting liability. "Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation--just as they are in cases involving alleged negligence by land-based third parties." *Id.* at 4704. This was the task the Supreme Court took up in *Scindia*.

Scindia involved a longshoreman who was injured in an unloading operation as the result of a defective winch that was part of the vessel's equipment being operated by the stevedore. In its opinion, the Court defined the line between the responsibilities of the stevedore and of the vessel. The vessel has a duty with respect to the general condition of the ship's gear, equipment, tools, and work space, and a duty to warn the stevedore of hidden dangers which are or should be known to the vessel in the exercise of reasonable care.

and that are not known or obvious to the stevedore. *Id.* at 167. Also, if the vessel actively involves itself in the cargo operation, or fails to exercise due care in protecting longshoremen from dangers they might encounter from equipment under vessel's active control, it would be negligent. *Id.* However, with respect to cargo not loaded by or under the active supervision of the vessel, the Court explained that the vessel could rely on the expertise of the stevedore. *Id.* at 170-71; *see, e.g., Kakavas*, 789 F.2d at 118 ("The basic theme of the *Scindia* opinion is the extensive reliance that a shipowner may justifiably place on an independent contractor.").

The stevedore, in turn, who is in the best position to avoid accidents during the cargo operation, has a statutory duty to provide for the safety of longshoremen under 33 U.S.C. § 941 (1982) and warrants to the vessel that he will perform competently. *Scindia*, 451 U.S. at 170-71. On this basis, the Court stated that "absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Id.* at 172. Against this background, we consider the alleged negligence of the vessels in this case.

III.

Discussion

Scindia was, of course, a case in which the longshoreman's injury resulted from the malfunctioning of the ship's gear being used in the cargo operations. The Court held that there was a triable issue as to whether the shipowner knew of the defect or was chargeable with such knowledge.

Scindia, 451 U.S. at 178. Appellants here argue that nothing in *Scindia* supports the distinction made by the district courts in *Derr* and *Robertson* between unsafe conditions resulting from the manner in which cargo is stowed and other types of unsafe conditions. This argument is contrary to the Court's analysis in *Scindia*, and we reject it. We read the Court's opinion in *Scindia*, giving effect to Congress' intent "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore," *id.* at 168, as limiting the vessel's potential liability for injuries caused by faulty stowage of cargo to certain narrow circumstances.

A.

No Duty to Inspect and Supervise

Scindia compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out the stevedore's failure to perform his job properly.[1] *Scindia* recognizes that the general rule that vessels have no duty to supervise or inspect cargo operations may not apply where there is "contract provision, positive law, or custom to the contrary." *Scindia*, 451 U.S. at 172. No evidence was presented to trigger this exception in the *Robertson* trial, but Derr called Captain Bernard Oudijk, an expert witness, who testified that it was customary in the maritime industry for vessels to observe the loading of cargo. The district court apparently rejected this

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1. To the extent that Di Rago v. American Export Lines, Inc., 636 F.2d 860 (3d Cir. 1981), predicated liability on a vessel's duty to inspect or supervise the loading stevedore's cargo operation, it is no longer binding precedent in light of the subsequent decision in *Scindia*.

testimony as a matter of law, believing it to be merely an attempt to restate as a custom the general duty to inspect cargo rejected in *Scindia*.

Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo, *see Tulane Note*, *supra* at 1433, we agree with the district courts that such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability. *Cf. Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1072 n.1 (4th Cir. 1982) (referring to dangerous "packing of the rolls [of paper] by the shipowner in a foreign port"); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 n.2 (5th Cir. 1984) (no evidence that vessel used independent stevedore to load cargo).

In a similar effort, the appellants urge this court to revive the duty of supervision by adopting an excessively narrow reading of *Scindia*. Appellants would have it that, while there is no duty to supervise the work of a stevedore "to discover dangerous conditions that *develop* within the confines of the cargo operations," *Scindia*, 451 U.S. at 172 (emphasis supplied by appellants), the vessel does have a duty to inspect the cargo before cargo operations begin and therefore "*is charged with knowledge of*, conditions which exist at the *start* of cargo operations." Appellants' Brief at 31.

It is true that some courts of appeals have read the law in a manner compatible with appellants' arguments. The *Scindia* rejection of a duty to inspect or supervise cargo operations has been taken to apply only once the stevedore has commenced work, allowing the inference of a stricter duty including an obligation to inspect cargo already loaded before turning the hold

over to the off-loading stevedore. *See, e.g., Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983); *Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1565 (11th Cir. 1986); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986).

The district court in *Robertson* thought this reading would "eviscerate" *Scindia* and the Act: "while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity." *Robertson*, 655 F. Supp. at 155; *accord Scindia*, 451 U.S. at 168-69 (inconsistent with Act to hold vessel has "continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process"). We agree.

Derr and Robertson suggest that although *Scindia* signifies that the vessel may not be liable for the negligence of the American stevedore employer, the shipowner may be held liable for unsafe conditions created by improper stowage by a foreign loading stevedore. They rely chiefly on the decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

The *Turner* court believed that the safety of longshoremen was furthered by making the vessel responsible for cargo loaded by foreign stevedores because, "[a]s between the vessel and the [American] stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen." *Id.* at 1304. Because the offloading stevedore has no control over the foreign stevedore, the vessel can ensure safety "by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the

offloading stevedore of concealed dangerous conditions created by the foreign stevedore." *Id.*

We cannot accept the *Turner* analysis. As *Scindia* makes clear, the 1972 amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo. 451 U.S. at 170-72; *cf. Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 862 (2d Cir. 1977) (finding vessel had no duty of care with respect to foreign-loaded cargo in light of congressional intention to "relieve shipowners of liability predicated upon the negligence of stevedoring companies"). As this court has pointed out before, "creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir.), *quoted with approval in Scindia*, 451 U.S. at 169, *cert. denied*, 434 U.S. 861 (1977).[2]

Thus the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo. The scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores. *See, e.g., Spence v. Mariehamns R/S*, 766 F.2d 1504 (11th Cir. 1985) (making no distinction between duty of vessel to inspect foreign and domestically-loaded cargo). It follows that the district courts did not err in declining to increase the duty on the vessel with respect to cargo because it was loaded by foreign stevedores.

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2. *Turner* is also distinguishable from the cases here insofar as the danger in that case was concealed. In dictum, the decision has been limited to that situation by the Ninth Circuit Court of Appeals. *See* Taylor v. Moram Agencies, 739 F.2d 1384, 1387 (9th Cir. 1984).

B.

Duty for Ship and Equipment

Before the 1972 amendments and the *Scindia* decision, the Supreme Court had recognized that the vessel owes to the stevedore and longshoreman "the duty of exercising due care 'under the circumstances.'" *Scindia*, 451 U.S. at 166 (quoting *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969)). In *Scindia*, the Court defined the vessel's duty with respect to the ship and equipment thus:

> to exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warn[ ] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id. at 167; *see also id.* at 172; *id.* at 180 (Powell, J., concurring).

Thus, we have imposed liability on the ship for injuries resulting from a defect in the hatch covers, *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979), *vacated sub nom. American Commercial Lines, Inc. v. Griffith*, 451 U.S. 965, *on remand*, 657 F.2d 25 (1981), *cert. denied*, 456 U.S. 914 (1982), and from a defective gangway which, albeit

supplied by the stevedore, became the vessel's gangway, *Sarauw v. Oceanic Navigation Corp.*, 622 F.2d 1168 (3d Cir. 1980), *vacated*, 451 U.S. 966, *on remand*, 655 F.2d 526 (1981), *cert. denied*, 456 U.S. 914 (1982).

Appellants do not contend that either of the vessels in this case was defective, or that their equipment, gear, or tools suffered from any defect. Appellants have stressed that the Supreme Court referred to "work space" when it spoke of the ship's duty extending "to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations." *Scindia*, 451 U.S. at 167. We construe that language to refer to the physical work space. The Court could not have intended by this reference to establish a duty by the ship with respect to cargo that it had expressly negated in other portions of the opinion. Thus, there was no basis in either of these cases for the jury to have found negligence by the ships on the basis of any defective equipment or gear.

C.

Duty to Intervene

The parameters of the vessel's duty to intervene in cargo operations were not fully drawn in *Scindia*. The only discussion in that opinion related to the shipowner's "duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Scindia*, 451 U.S. at 175. The Court disapproved of the Ninth Circuit's standard that "if the vessel should realize that the condition presents an unreasonable risk of harm, it is liable if it 'fails to exercise reasonable care under the circumstances' to protect the longshoremen." *Id.* at 174. The Supreme Court characterized this as the "duty to inspect thesis."

which it had already rejected. *Id.* It was also unprepared to accept the more modest duty imposed in *Evans v. Transportacion Maritime Mexicana*, 639 F.2d 848, 856 (2d Cir. 1981), under which "the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard" that the stevedore will not or cannot correct and that the longshoreman cannot avoid. *Id.* at 175. The *Scindia* Court was prepared only to hold that if it were proven that the ship knew of the malfunctioning cargo winch that was part of the ship's own gear, and which it might have a duty to repair, there was a basis for imposition of the negligence liability.

It is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear. *See, e.g., Hodges v. Evisea Maritime Co., S.A.*, 801 F.2d 678, 683 (4th Cir. 1986) ("jury could conclude that the vessel had a duty to intervene and exercise its control over the No. 3 hold to eliminate the dangerous conditions of the open hatch and poor lighting"), *cert. denied*, 107 S. Ct. 1572 (1987). Since the ship has no duty to inspect the cargo handling operation or the stowed cargo, *Scindia*, 451 U.S. at 178; *see Taylor v. Moram Agencies*, 739 F.2d 1384, 1386-87 (9th Cir. 1984) ("[t]he scope of the shipowner's duty as set forth in *Scindia* focuses on the character of the ship and its equipment - not on the nature of the cargo"), there would ordinarily be no duty to intervene to remedy dangers created by negligently loaded cargo.[3]

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3. There was nothing in either case to suggest that the cargo presented an exceptional situation. We leave open the issue of a duty by the ship in such circumstances.

D.

Duty to Warn

Because the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, if at all, when the ship has both actual knowledge and the danger was not open and obvious. The district court in *Derr* found undisputed evidence that the danger was apparent to both the vessel and the stevedore, and that there was no warning that the ship could have given that would have added to the knowledge of a competent stevedore.[4] Indeed, appellant conceded in his brief that even the lack of dunnage and shorage, alleged to be an underlying cause of the accident, "was a condition that could have been discovered by a reasonable inspection of the hold." Appellants' Brief at 46. Consequently, as a matter of law, there was insufficient evidence upon which a jury could find liability. *See Taylor*, 739 F.2d at 1386-87. We find no error in the court's analysis or its conclusion.[5]

The decision of the district court in *Robertson* was based squarely on the lack of evidence upon which a jury could reasonably have made a finding of actual knowledge, or breach of any duty to know, of the alleged dangerous condition of the cargo. Appellant argues that the evidence of the inspection of the cargo by Cook, an independent cargo surveyor hired by the

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4. The district court in *Derr* did not reach the issue of the vessel's actual knowledge of improper stowage. The only evidence even supporting knowledge was the testimony of the ship's master that "I think there was somebody" assigned to be present to observe the loading of that cargo. App. at 43. This is insufficient, in any event, to show actual knowledge of improper stowage.

5. In light of our decision, we need not decide whether the method of stowage was a proximate cause of the injury.

vessel to check the cargo for insurance purposes, and testimony that the Chief Officer observed the condition of the cargo when the hatch was opened, combined with the fact that the dangerous condition of the cargo "would be immediately apparent to anyone looking in the hold," would have allowed a jury to find actual knowledge. Appellant's Brief at 44-45.

The district court correctly resisted this argument. It recognized, as we have set forth, that to find knowledge of dangerous stowage whenever a person associated with the vessel had reason to examine the cargo would be to reimpose the duty to supervise the stevedore. In any event, appellant's argument proves too much. For if the danger in the cargo was indeed readily apparent "even on a 'cursory' examination," *id.* at 45, then there can be no liability under *Scindia*.

IV.

Summary

We hold today that there is no general duty on the part of a vessel to supervise or inspect the work of stevedores, either during or between cargo operations. A vessel can be deemed negligent towards a longshoreman injured because of improperly stowed cargo only if the vessel has breached one of the limited duties referred to in *Scindia*. Appellants produced no evidence from which a jury could reasonably have concluded that any of those duties was breached. We will therefore affirm the judgment entered by the district courts in *Derr* and *Robertson*.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 86-1772

DERR, WILLIAM,
Apelllant

vs.

KAWASAKI KISEN K.K.

(D.C. Civ. No. 85-5250)

ON APPEAL

FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SLOVITER, STAPLETON, Circuit Judges, and FISHER, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 9, 1987,

On consideration whereof, it is now

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* The Honorable Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

here ordered and adjudged by this Court that the judgment of the said District Court entered December 3, 1986, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/S/ M. Elizabeth Ferguson

Chief Deputy Clerk

December 15, 1987

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-1031

ROBERTSON, THOMAS,
Appellant

vs.

TOKAI SHOSEN K.K.

(D.C. Civ. No. 86-2620)

ON APPEAL

FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SLOVITER, STAPLETON, Circuit Judges, and FISHER, District Judge*

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This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 9, 1987,

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* The Honorable Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

here ordered and adjudged by this Court that the judgment of the said District Court entered jANUARY 8, 1987, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/S/ M. Elizabeth Ferguson

Chief Deputy Clerk

December 15, 1987

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERR, WILLIAM	:	CIVIL ACTION
V.	:	
KAWASAKI KISEN K.K.	:	NO. 85-5250

Philadelphia, Pa., December 2, 1986

Before HON. LOUIS C. BECHTLE, J.

Bench Opinion

(Reconvened out of the presence of the jury.)

THE COURT: All right.

I have considered the arguments and the motions made at the close of the plaintiff's case and at the close of all the evidence under Rule 50. I have looked at the cases that have been cited and the Court's notes, and I believe the motion should be granted.

The plaintiff simply has not made out a case, Mr. Sovel.

MR. SOVEL: If Your Honor please --

THE COURT: Just let me finish.

MR. SOVEL: Yes, sir.

THE COURT: Then we can argue about it.

I have heard your arguments, and I think it is time for the Court to express its views.

The plaintiff's position here is that he went aboard as a member of the stevedoring crew, presumably an experienced stevedoring crew, and removed a relatively common place cargo of wood, lumber.

There wasn't anything that suggested there was anything special about it other than it is general, heavy cargo. It wasn't explosive or livestock or any radioactive material or anything more special about it.

He went on the work site presumably with the proper tools and equipment and supervision.

There was nothing wrong with the work site itself. It was lighted. It was intact. There was no evidence that there was

any unknown substance or debris about.

He went about his work and presumably it was done, even from his testimony, in an efficient and a relatively routine manner.

He saw the cargo had shifted. He saw that. The stevedore knew it had shifted. It was apparently visible.

His own testimony, as well as that of your expert -- and I think this is not a surprise -- is that it is not an uncommon thing to have cargo shifting, especially on a long voyage. It is encountered presumably with some regularity.

In the process of removing it, some of the cargo, for whatever reason, fell, without any reason whatsoever.

I don't think the law of real estate and the law of buildings apply in a circumstance like this, necessarily. The Scindia case, among other things -- and I think Felton is essentially the same thing -- says that the stevedore takes on the role of an

expert in the installing and removal and handling of cargo. He is an expert.

In that context, reasonableness or unreasonableness of risk has to be considered in the light of stevedoring work being admittedly dangerous, admittedly hazardous, admittedly with rough edges about it.

The nature of the work is that there is uncertainty. That's what the stevedore and the workers for the stevedore accept when they accept that employment. They accept the uncertainty of the location. They may be in the location where they work for only a few hours, they know very little about it, but they do know their work and that is why they are hired to do it.

In this circumstance the stevedore encountered a usual situation and, as a consequence of that, presumably Mr. Derr became injured in his work. But, where is the negligence? What was the ship supposed to have done?

Your expert testified that there is presumably a global custom that a ship's officer should watch the loading of cargo, even general cargo like this, lumber. Well, that seems to me, Mr. Sovel, to be in direct opposition with the Supreme Court's ruling that that is not the law.

The Supreme Court has said there is no duty on the ship, as a general matter, to inspect or supervise the handling of cargo.

The Supreme Court and the cases following Scindia have agreed that there can be some circumstances, due to either custom or law or regulation, where that exemption of the owner, if you will, to inspect and supervise the cargo operation doesn't apply, and I agree with that; but I don't agree that Captain Oudijk's position that it is a custom everywhere.

A custom is something that is regularly and routinely and historically done by reason of the circumstances. That is why it is

a custom. It is just done all the time that way.

So it seems to me that the Supreme Court, in excepting out from the duty of the shipowner the right of the shipowner not to be present from this notion of a custom or regulation, had in mind a circumstance where a custom would otherwise obtain.

I think you mentioned just one suggestion yesterday about possibly there might be operations in Alaska or in the Persian Gulf, in a war zone, obviously over a period of years in that setting, it might bring into play some custom because that circumstance would require a shipowner or a representative to be present during the cargo loading or unloading. Or, as I mentioned earlier, the kind of cargo that could be specially handled, such as explosives or, because of the danger involved, that possibly large pieces of medical equipment might require some special regulation as to how they are

to be handled and stowed, in what part of the ship.

But, we don't have that here. We have lumber here, and it seems to me that this is a classic example of where the shipowner does not have to be present. He turns the ship over to the stevedore, who is compensated for being an expert, and says, "Do the job. Here is our ship."

Presumably, the stevedore can use the ship's equipment. Many times they bring on their own equipment. They decide what they need.

It just seems that here the complaint is that the cargo wasn't properly stowed because of the absence of some procedure in the stowing process that would prevent the cargo from shifting. Well, if the plaintiff's employer had been told that, they wouldn't have any more knowledge than they had when the plaintiff saw that. There wouldn't be any more knowledge by telling

the plaintiff, "That cargo shifted," because the plaintiff knew it.

It just seems to me that the quote in Griffith v. Wheeling Steel, by our Third Circuit -- keep in mind, that case and Scindia are both equipment cases. One is a hatch, and the other is equipment. That is part of it.

In Griffith, the court did speak to the question of duty, and it gathered in the notion of a cargo, and I would just like to read this. This is on Page 27 of Griffith v. Wheeling-Pittsburgh Steel, 657 F. 2d 598:

> "The vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise or reasonable

care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would obvious to or anticipated by him if reasonably competent in the performance of his work."

Now, that quote obviously tilts toward the question of the equipment on the ship as opposed to the cargo itself. But, it goes on to say:

"The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn

the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman."

The reference in Scindia in these cases to the cargo feature -- there has to be intertwined with that notion, and I think it is stronger in the cargo cases, that there is a stronger control of the stevedore in the cargo cases than in the cases involving the ship and equipment. Because, I think the courts recognize in these cases that the ship pulls in, the stevedore doesn't know anything about the ship, possibly. He goes onto the ship. Maybe he is there for a few hours and he then leaves. And so, when it comes to the winches and the cables and the ladders and hatches and the like, there is some duty of the ship to know of the condition of these things and to warn if the ship

believes the stevedore will not know.

But, when it comes to cargo and its appearance as it is seen by the stevedore and what to do about it, it seems to me that, in the absence of something that would be latent, the shipowner has no duty to tell the stevedore not only when the stevedore can see it, as we have in this case, but where he would be expected to see it.

So this seems to be a stronger case of the stevedore occupying the role of the expert with full knowledge, encountering the project, known and expected in the industry to be dangerous, known and expected in the industry to be capable of causing injury, and that is exactly what happened.

No one quarrels with Mr. Derr's injury and no one quarrels with the notion that he did suffer from discomfort and pain. Nobody is challenging that.

But, aside from the custom feature, even if there was no custom, the fact that

this was known and encountered seems to me to be a clear circumstance where there is no liability on the shipowner.

Even if the shipowner could be said to be negligent, if we would accept Captain Oudijk's position that there was such a custom, which I don't accept because I don't think it is a special circumstance, he didn't isolate this as a special circumstance, and I think the Supreme Court means, when they say in Scindia, "'As a general matter,' the vessel owner was entitled to assume that the stevedore would discover patent defects and avoid the risk presented."

In this circumstance there wasn't anything special about this, so it could be expected that the stevedore would and, indeed, did discover this patent defect, that is, the shifting of the cargo. It was visibly seen.

So, I think the suggestion to the Court that the court's finding in Felton, Finding

No. 2 in Felton v. Compagnie Maritime Zairose, C.M.Z., Civil Action 84-5347, Eastern District of Pennsylvania, July 17, 1985 -- there, the Court found in holding that the defendant was not negligent with respect to the accident that occurred to the plaintiff on December 28, 1982, the Court's Conclusion No. 2, which was advanced by the plaintiff in the present case before the Court, was: "The ship's duty extends to the storage of cargo as well as to the ship and its equipment."

Well, that is certainly true, but not in isolation; it should be read in connection with the preceding Conclusion No. 1, which is a reference to the Scindia decision and other conclusions, as well.

So there is no question there is a duty on the ship with regard to cargo. There is a duty, not to have complete supervision and inspection, but there is a duty in respect to cargo to give notice to a stevedore of a

defect that the stevedore would not likely expect to encounter in the exercise of his expertise.

If you had some special circumstance involving a special cargo of some sort that had certain properties to it that would cause injury and it wouldn't be known -- for example, lifting out large containers that might contain chemicals or something that could explode if moved in a wrong way, and they weren't labeled as such -- if the shipowner knew that, he would have the duty to tell the stevedore that.

There are many, many other examples about on the two grounds, then, I simply don't think that Captain Oudijk's testimony concerning the custom is the same custom that the court spoke of in Scindia.

The Supreme Court, in my view, in the Scindia circumstance, obviously meant that as a general proposition, the giving over of the ship for loading or unloading by the

stevedore was tantamount to turning the entire task over to an expert in loading and unloading, and in the absence of some custom that would be suggested by the circumstance, which is what Captain Oudijk's position apparently is -- that, if the ship is being loaded or unloaded, the officer should be there. The Supreme Court says that is just not so.

So, for those reasons I simply do not think that the plaintiff has established, on the question of liability, sufficient evidence under the law that a reasonably well-balanced jury, properly instructed, could find in his favor.

I am not critical. You have given me all the evidence you have, Mr. Sovel, and I think Mr. Derr is an honest person, but that is where it leaves us.

MR. SOVEL: If Your Honor please, number one, if I recall your remarks correctly, you indicate that one of the bases was that

the working with a shifted cargo is a customary or usual thing.

THE COURT: It is not unusual.

MR. SOVEL: Not unusual.

However, I would point out to you that it does not necessarily follow from that that it is a safe thing or that reasonable care of the shipowner is to present a stevedore with a shifted cargo.

I believe that what Your Honor has done in this situation has indirectly introduced back the defense of the assumption of risk. You are saying that the longshoremen are deemed to assume the risk of this dangerous condition because it is not that unusual to be presented with cargo that has shifted.

While I do not have a copy of the Scindia decision in front of me, I would direct Your Honor to what I believe is Footnote 6 to that opinion in the Scindia opinion, which specifically notes that the defense of assumption of risk is not abolished

and that the longshoreman's knowing acceptance of a dangerous condition is not a defense to the shipowner, and that, therefore, to whatever extent Your Honor is saying that the longshoreman is assuming the risk of this condition because it was not unusual, I would submit that Your Honor is in error.

THE COURT: I did not say he assumed the risk. There is no notion of assumption of risk.

I am saying the stevedore's work contemplates that it may be unsafe.

O.K.?

It may be, even though usual and unsafe, it doesn't automatically make the shipowner liable.

MR. SOVEL: But it also does not relieve the shipowner from liability.

If the condition is unsafe, then the longshoreman -- I am not talking about the stevedore, I am talking about the plaintiff,

the longshoreman -- does not assume the risk of that unsafe condition.

The issue is whether it is unsafe. But, if it is unsafe, then it can not be said that he is assuming that risk.

And there is specific attention given to that in what I believe is Footnote 6.

THE COURT: I am looking at that. It must be another one.

MR. SOVEL: But there is a reference to assumption of risk.

THE COURT: Do you want to look at it?

MR. SOVEL: If I may.

(A book was given to Mr. Sovel.)

THE COURT: You don't have to take the time now, but whatever your preference is.

MR. SOVEL: Pardon me. It was Footnote 22.

THE COURT: All right.

MR. SOVEL: It refers to the fact that the defense of assumption of risk is unavailable.

THE COURT: Let me read it:

"We agree with the Court of Appeals that the shipowner may not defend on the ground that Santos should have refused to continue working in face of an obviously dangerous winch which his employer, Seattle, was continuing to use. The District Court erred in ruling otherwise, since the defense of assumption of risk is unavailable."

I agree with that.

MR. SOVEL: I would submit that your interpretation of the facts, in which you are saying, Your Honor, that working with cargo that has shifted is something that the stevedore takes on, if that shifting creates a dangerous condition, the longshoreman does not assume the risk of that dangerous condition.

THE COURT: I didn't say that, and I don't want you to suggest that I said that.

The outcome is obviously the same, that

the plaintiff can not recover. The ultimate outcome is the same.

The question is: Where is the duty? That is the real question.

MR. SOVEL: I want to come to that. I just want to say, in setting this whole picture before Your Honor, the fact that cargo may come in shifted, and the longshoremen may frequently have to work under cargo that has shifted does not mean that presenting them with shifted cargo is safe. It may be unsafe, and they may just work under unsafe conditions under various circumstances, and that would be a question for the jury to determine.

In other words, what is usually done doesn't necessarily make it safe.

THE COURT: Well, the issue isn't whether it is safe or not.

MR. SOVEL: That is a factual question for the jury to determine, whether this cargo presented in this shifted condition

was safe. That is one of the factual questions that this jury should determine.

Secondly, Your Honor, with respect to the testimony of Captain Oudijk, first of all, I wish to call to Your Honor's attention -- and I think it is important here -- on Page 12 of Captain Miuchi's deposition I asked him:

"Question: Was anybody from the ship's crew assigned to be present to observe the loading of that cargo in the No. 1 hold in the Philippines? "Answer: I think there was somebody.

"Question: Do you know if any shoring or supporting wood was used?

"Answer: I think it was used."

Now, the purpose of the testimony here was to prove, I think, an element of my case, the plaintiff's case, in this situation. It is to prove that the shipowner either knew or should have known that no shoring was used in this cargo, because

negligence is a concept that ultimately depends upon knowledge of the shipowner of the unsafe condition.

I actually believe that the testimony of the master, himself, that someone was assigned to be there to observe it is sufficient to establish that knowledge, or reason to know what was done in the loading and whether shoring was used or not.

Captain Oudijk's testimony was merely in that area. It was in confirmation of that element that there is a custom and practice to make such inspections to discover the conditions.

Because, the basic duty of the shipowner, and my reason for coming to citing the Felton case, was when they turned the ship over to the stevedore, they had a duty with respect to the ship's equipment. And Felton stands for the principle, and cargo, and that's all it has to do with, the extent to which and the manner in which it was

stowed -- to present the cargo to the stevedore in such a manner that it can be discharged by a competent stevedore using normal stevedoring methods, that he can do it safely, using customary and reasonable stevedore methods.

Therefore, the element of my case is to prove that the cargo wasn't in safe condition, that the shipowner had reason to know or knew about it. Those are some of the elements of my case.

Proof of the knowledge of the condition of the stowage in the foreign port is to show that they have men to know that shoring was not used and, because it was not used, the cargo shifted and created an unsafe condition.

Then the fact that the condition is open and obvious. If I interpreted Your Honor's remarks correctly -- and I believe I did -- that the second element of what Your Honor was talking about is that: Well, the

stevedore knew about this condition.

But, Santos is clear, and Griffith is clear, that the fact that a condition is open and obvious is not always a defense to the shipowner, because it goes to the question of, if the shipowner makes its inspection or knows of the existence of an unsafe condition and that condition exists there, if the stevedore doesn't know about it, then the shipowner has a duty to tell them. That is the easy part of Santos and, frankly, that is the part that Your Honor quoted.

If the condition is open and obvious, then the stevedore is given warning of it without an actual verbal warning being given.

But, is the fact that they have told the shipowner about it in and of itself sufficient to relieve the shipowner from liability? And the answer to that is, it depends upon the facts of the case, whether there were circumstances there that the

shipowner had a right to rely on the stevedore to take whatever appropriate action would be necessary to correct that unsafe condition and, therefore, it is, in essence, saying, well, the shipowner is negligent but we hired you as the stevedore, and you should be able, exercising reasonable stevedoring methods, to handle this cargo and to correct this condition.

The cases hold -- and I will get to them in a minute, but I think the point is that not every condition that confronts a stevedore can be corrected by the stevedore.

If it can't be corrected, merely telling him about it and saying, "Now, you know about this dangerous condition," does not relieve the shipowner for that --

THE COURT: Well, saying it doesn't make it so. Someone must get up on this stand and say, "We are confronted with this cargo circumstance. The entire Hold No. 3 was upsidedown. We couldn't get that mater-

ial out of there. We asked the shipowner for a plan. He wouldn't give it to us.

We don't have that here.

MR. SOVEL: In fact, when they make the argument that something is open and obvious, they are also bringing in their expert to say what the longshoremen should have done to correct that condition. What is it that we could have done differently or should have done to remedy this condition? That is one of the questions of fact that the jury has to determine.

Now, that is why I brought in Mr. McGowan to testify, "Well, he should have used a poker or he should have put a chock under it."

THE COURT: I am just considering the plaintiff's case, not the defense case.

MR. SOVEL: But within that framework I don't initially negate a defense.

While I may have the burden of proof on an issue, there is the defense that the

condition is open and obvious, and with its being open and obvious, you should have done it differently.

And then I might come back and rebut their claim as to how I should have done it differently.

But, until I know what they are contending that my people should have done differently, I have my basic issue that it is an unsafe condition.

Here we have men working on a cargo that has shifted. The fact that they are given warning of it, in and of itself, doesn't make their working on it wrong --

THE COURT: The shipowner would have a duty to intervene if he anticipated that the condition would be in some way negligently acted upon by the stevedore, and there is no evidence of that here.

MR. SOVEL: No, the shipowner would have a duty to intervene if he knew that the stevedore wasn't doing something to correct

the condition.

THE COURT: No, I don't agree with that.

MR. SOVEL: It comes back to what the McCarthy case was all about, Your Honor. If a condition exists and it is an unsafe condition and there is nothing that the stevedore can do about it, then the fact that the stevedore knows about it or the longshoremen know about it, doesn't relieve the shipowner from liability. That is precise point that was resolved in McCarthy.

There was a specific request there for the jury to find, could this have been corrected by reasonable stevedoring methods? The jury found, no, that it could not be corrected by reasonable stevedoring methods.

And the cases such as Moore v. M. P. Howlett, Inc., 704 F. 2d 39 and 4 -- I could read it to Your Honor. It is just a brief part. It is from the Second Circuit in 1983:

"The shipowner is not relieved of liability as a matter of law simply because it relied on the stevedore to correct the condition," --

Citing the Scindia case and the Evans case.

-- "or because it relied on the stevedore's judgment to proceed with the work in spite of the condition," --

Citing Lopez v. A. F. Spindler.

Then I am quoting:

"In some circumstances the question of whether the owner's actions were negligent or not is for the jury to decide,"

--

Citing Evans and Napoli, also Second Circuit cases.

Further on in Moore:

"We disagree with the District's Judge's evaluation of the evidence. His determination was premised on its finding that since neither plaintiff

nor the stevedore anticipated harm from the obvious hazard, it was unreasonable to hold the shipowner liable for failing to anticipate that harm. The fact that neither plaintiff nor the stevedore took any precautions in the face of this hazard does not relieve the defendant of responsibility, for it is fundamental that there may be more than one proximate cause of an injury. Thus, the jury could have found that the stevedore, shipowner, and plaintiff all unreasonably believed that the longshoreman could perform his duties on the barge without injury."

And they held the case could properly go to a jury.

By the way, I am reading from a trial brief that I use in other cases but I can hand it up to Your Honor.

THE COURT: Do you have an additional copy?

MR. SOVEL: It is a copy --

THE COURT: I don't want to take your only copy.

MR. SOVEL: No, I have plenty of these copies at home, so to speak.

THE COURT: All right.

MR. SOVEL: But the point is this, Your Honor, and the open and obvious defects is always a question of fact for the jury because it is a question as to, one, whether the shipowner knew that the stevedore would be taking the appropriate corrective action, whether it should have anticipated -- if there was nothing that the stevedore could do to correct the condition, then it can be inferred from that that the shipowner knows they would not be able to take any corrective action.

THE COURT: But we don't have that in this case.

MR. SOVEL: What we have in this case are two bundles of lumber in unstable condi-

tion that nobody can do anything about except get that wire under there and get it out, and that's what the men were trying to do.

But, the fact that the condition could not be remedied by any stevedoring method that is suggested -- and that would be more for the jury to determine -- does not relieve the shipowner from negligence in causing or allowing that condition to exist in the first instance.

The open and obvious defense is an approach to relieving a defendant from liability for its original negligence. And if you analyze the law carefully, whether it is the state law or maritime law, you are dealing with a condition that comes into existence by reason of the defendant's negligence. The defendant is trying to be excused of that negligence on the ground that the condition was open and obvious.

Well, the only basis for excusing the

defendant for its original negligence on the basis that a condition was open and obvious is that the person who was given that warning of that unsafe condition could do something to remedy it. Because, the fact that it is open and obvious is meaningless.

It is just like a person speeding down the street honking his horn and saying, "Get out of my way. You knew I was coming." It is open and obvious that you were coming, but it doesn't excuse your speeding.

So, the Scindia case and the Griffith case are clear in saying that, while the initial duty of a shipowner is to warn, it is not the exclusive duty, because the warning in a given situation may not be enough to enable the longshoremen to avoid confronting the danger and, if they can not avoid confronting the danger, all the warning in the world and all the open and obvious conditions in the world do not excuse the shipowner from causing the negligence to

come into existence.

THE COURT: If the owner knew that the stevedoring company would employ negligent methods, that is when the court said that's when the owner must step in and say, "Wait a minute, don't you hurt that longshoreman. This is a dangerous condition and we know what you are going to do and, if you do it, you will hurt him."

MR. SOVEL: It doesn't say negligent methods.

THE COURT: Well, whatever --

MR. SOVEL: No, because what it is, if the type of condition is such that it can not avoid confronting it, then the shipowner can not say that, "We were relying on the stevedore to correct it."

THE COURT: But there is no evidence here that the shipowner knew or anticipated that the stevedore would function in a way other than as an expert stevedore would.

If they don't have to stand there, how

are they supposed to learn that?

MR. SOVEL: Your Honor, with all due respect, I think Your Honor is really starting at the wrong starting point.

First of all, what is it that the stevedore should have done differently?

THE COURT: No, let's start at the real starting point. Describe the duty of the shipowner.

MR. SOVEL: The duty was to present them with a cargo that was safe for discharge, which means not shifted and not in an unstable condition; that the condition itself arose from the fact that the cargo had shifted; that it shifted because it wasn't shored; and that they should have known that it wasn't shored and that the reasonable expectation from that was that it might shift.

In other words, it is analogous to McCarthy, although obviously there are differences. In McCarthy, there was no proof

that the shipowner knew that the frozen block of sugar was in the hold. What the shipowner knew was that they were negligent in maintaining the hatches. This allowed the water to leak into the hatch, and the combination of that with the weather conditions created the frozen block of sugar that fell.

The negligence was going back to the time that they allowed the leaky condition to exist in the hatch.

THE COURT: Plus -- I know you have read the case -- plus knowledge by the owner that the stevedore would employ improper methods.

MR. SOVEL: No. And I tried the case. I know the case.

THE COURT: I just read it. I don't care whether you tried it, but --

MR. SOVEL: The evidence was that the stevedore did nothing cause there wasn't anything that the stevedore could do.

THE COURT: All right.

MR. SOVEL: That was the whole point of it. The frozen block of sugar existed on the top of the hatch. There was no way they could remove it, so they worked with it.

The question was, was that a condition that could be remedied by a reasonable stevedore?

That went to the jury and it was open and obvious, they knew it was there, and the Court said that that was not a defense under those circumstances.

Now, here you are dealing with a situation -- in other words, it is a question of timing. They have a duty to see that their cargo was loaded in such a manner --

THE COURT: We are talking about Griffith, right?

MR. SOVEL: No, McCarthy.

THE COURT: I'm talking about Griffith.

Let me read what the Court of Appeals said in Griffith:

"Here,"

Meaning in Griffith.

-- "by contrast, the District Court found that prior to turning control of the barge over to the stevedore, American Commercial Lines, Inc.," --

The owner.

-- "knew or should have known of the defect, and had reason to believe that Wheeling-Pittsburgh," --

The stevedore.

-- "might use a negligent method to remove stuck hatch covers, but took no steps to prevent harm to the injured longshoreman. Thus, Scindia is clearly distinguishable from this case," --

Meaning Griffith.

All I'm saying is that the condition, coupled with knowledge by the owner that the stevedore will function in, as they say, a negligent manner, could reinstate, if you will, the duty of the owner to do something

that under Scindia the owner is excused from if the stevedore takes over the loading and unloading operations.

That's how I see it.

MR. SOVEL: But, Your Honor, I don't quarrel with what you are saying, but I think Your Honor is not going far enough. You are looking at it in too narrow a universe.

You may have a condition, an unsafe condition, which in combination with negligence by the stevedore produces an injury. That is Griffith.

THE COURT: No, it is not.

MR. SOVEL: It is knowledge plus negligence and knowledge of the negligence.

THE COURT: Known by the owner or evidence that it was anticipated.

MR. SOVEL: Let me take it a little slower and more step by step.

In Griffith you have an unsafe condition of the hatch cover. It was a stuck

hatch cover known by the shipowner.

THE COURT: All right.

MR. SOVEL: All right.

Negligent, theoretically, in supplying a known defective hatch cover.

THE COURT: And known by the stevedore, too.

MR. SOVEL: I haven't gotten there yet.

THE COURT: All right.

MR. SOVEL: You have with that the fact that the stevedore knows it is negligent.

THE COURT: All right.

MR. SOVEL: Then you have the fact coupled with that that the stevedore was negligent in using it.

Then you have the issue as to whether the shipowner knew that the stevedore was negligent and under those circumstances they hold that, if the shipowner knows that the stevedore is negligent in not correcting its unsafe condition, liability can swing back to the shipowner.

THE COURT: Exactly. And the longshoreman is protected by the circumstance because the stevedore won't do it, and the owner can't stand by and watch this happen.

MR. SOVEL: Exactly.

Now may I take you through McCarthy in the same way?

THE COURT: Go ahead.

MR. SOVEL: Unsafe condition created by the negligence of the shipowner: the leaky hatches. That's McCarthy.

It creates an unsafe condition in which natural conditions resulted as a proximate cause for creation of a frozen block of sugar in the roof, the ceiling of the ship hold.

THE COURT: Right.

MR. SOVEL: The longshoremen in the hold see it there. They know about it. They can't remove it. It was frozen solid. They couldn't remove it. They worked there.

Later on, because the ship is rising in

the water and the sun is beating on the side of the ship, it finally comes loose and falls and hits the longshoreman. Open and obvious condition. Nothing --

THE COURT: It is beyond the stevedore's expertise, right? He can't do it. His tools and skill and ability will not allow him to address that.

MR. SOVEL: They tried to bang it loose and they couldn't.

The shipowner remained negligent.

Now, that is this situation. The issue in McCarthy was whether the stevedore could have done something about it. That was a factual issue.

Here, you have a condition that results from the initial negligence of the shipowner. In this case we have a condition that results from the initial negligence of the shipowner in permitting the cargo to be stowed without shoring.

I point out to you that you have the

testimony of their master that it should have been shored and the testimony of their master that they had somebody there observing it.

THE COURT: That is cutting it a little thin.

MR. SOVEL: It's thin, but I submit it is a jury question.

THE COURT: No, he wasn't there. It has to be based on hearsay. He wasn't there. He said he wasn't present, right?

MR. SOVEL: No. He was asked, "Do you know if it was supplied?"

He says, "I don't know."

He was asked, "Should it have been?" And he said, "It should have been."

That is very specific:

"Question: Was anybody from the ship's crew assigned to be present to observe the loading of the cargo in the No. 1 hold in the Philippines?

"Answer: I think there was somebody.

"Question: Do you know if any shoring or supporting wood was used to hold it in place when it was loaded in the Philippines?

"Answer: I think it was used.

"Question: But do you know it?

"Answer: No, I don't know because I didn't see it.

"Question: Should it have been shored in place at the time it was loaded in the Philippines?

"Answer: Should have been."

Now, that's the master's testimony.

THE COURT: All right.

I think there are a lot of problems with that as an expert opinion and the like, but let's assume that is so.

MR. SOVEL: I think it is sufficient to establish knowledge by the shipowner that, one, the shoring should have been used, because he admits it should have been used, and that they should have somebody there to

observe the operation.

THE COURT: Knowledge by a person, at least, that in that person's view it should have been used. Let's assume that would be qualified that he had knowledge and he said, "In my opinion, that lumber in the No. 1 hold," the particular area where the plaintiff worked, "should have been shored and, when it got to Philadelphia, there was none there."

All right.

MR. SOVEL: There was no shoring in the entire hold, not just in the one particular point, but in the entire hold, and this allowed the cargo to shift.

THE COURT: The entire hold is going to hurt your case because that means all over the operation, and the stevedore sees it nowhere. It would be a better case for the plaintiff if it were only in this place.

MR. SOVEL: I disagree with Your Honor, but I don't want to argue with you, because

I think it is better the other way.

It is better for me the other way because, if there was none there, you can infer from the observation. If it was not just in one specific point, that would be a different type of observation made at the loading point. But, whatever it may be, we are assuming knowledge the condition is unsafe.

They are saying the ship comes in, the lumber is there, it is seen that the area is somewhat unstable and tottering, but the man are going to work it. They decide to work it.

What do they do at that point to remedy that unsafe condition? Nothing can be done at that point.

It is the same thing as McCarthy.

THE COURT: Let me just ask you one thing: Where is the evidence of that in this case, that nothing could be done by the stevedore, that the Holt Company said that

in that situation nothing could be done?

MR. SOVEL: Your Honor, I don't know how one proves nothing.

THE COURT: You bring Holt down and he will say, "We couldn't do it."

MR. SOVEL: You know what they suggest could have been done -- and that's exactly the way McCarthy went, and that's exactly the way the testimony here was -- you don't know what to rebut. That's where the open and obvious defense comes in.

I may have the burden of proof, but I don't have the burden of going forth with the evidence on that point. I can't, because I can't expect to anticipate and bring in somebody to go down a whole list of things that don't exist and say, "They can't be done."

You wait until Mr. McGowan gets on the stand and he testifies as to what should have been done, and then I argue to the jury, "Do you believe that could be done?

Could it have been done? Is it reasonable?" Or if I think it is evidence, I bring it in.

It is my burden of proof but their burden of going forward.

That's exactly the way the McCarthy case was tried: I bring in my evidence of the frozen block of sugar. They say it is open and obvious. They then bring in their evidence as to what the men should have done. I argue against it. The jury decides, is this a condition that could have been corrected by a reasonable stevedore?

THE COURT: I am not sure that the condition on the ship is not the same as the cargo circumstance, anyhow.

MR. SOVEL: In fact, it was the condition of the cargo, because, in fact, it was the sugar that was the cargo froze.

On that point, Your Honor, the question as to whether this is a cargo that was in such condition that it could be discharged by a stevedore using customary stevedoring

methods was reasonable safety is an issue for the jury to determine.

There is evidence here from which this Court find or the jury could conclude that the defendant has knowledge of the conditions which led to the creation of that condition. That is, an absence of shoring.

That is precisely what the McCarthy case was all about.

Then, that's when I come back to the point and say, "Well, they always handle cargo that has been shifted."

Well, there are different degrees of shifting. There are different degrees of problems. They don't accept the risk of it if it is unsafe.

THE COURT: All right.

Let me hear from Mr. Berry.

MR. BERRY: Your Honor, I would quarrel with a great deal of what has been said by Mr. Sovel, but let me recast the argument as I see it.

First, the issue in this case is not whether the cargo was unsafe. The question is whether the cargo created unreasonable risk of harm to longshoremen. Those are the terms used by Griffith and Scindia.

I would suggest to you that one of the reasons that there was no evidence in this case by the company that there is nothing that could have been done is because nothing needed to be done because it was not an unreasonable risk of harm to longshoremen.

Plaintiff has to prove that the shifted cargo created an unreasonable risk of harm to experienced longshoremen doing their job. That is not a question of open and obvious, it is not a question of assumption of risk. It is a simple element of proof in this case under Scindia and Griffith.

He must prove it was an unreasonable risk of harm to longshoremen experienced in their work.

I ask the Court: What evidence came

from that witness stand that said that this cargo created an unreasonable risk of harm to longshoremen? There was none.

What the jury is going to be asked to decide in this case -- and this is something I came across last night when I was trying to prepare my closing argument: Jurors are here to decide facts, not legal issues.

There are no facts to decide in this case.

Mr. Derr went on board a ship, was faced with a shifted cargo, cargo that he and plaintiff's expert both admitted he had run across before, and they went about their usual job of discharging it, and at some point a bundle fell. Nobody knows why it fell.

Those are the facts in this case. I don't think there is any dispute that they are the facts in this case.

What legal issues have to be decided by the Court are, one, what duty does the ves-

sel owner have with respect to the stow? The first comment counsel made was that the vessel owner was present during loading.

I draw the Court's attention to both the Rich and the Hurst cases, both Third Circuit decisions, which state that the fact that a vessel owner was present or that he was supervising cargo operations is not enough.

The amount of control necessary to affix liability to the vessel owner for the kind of stow in this case is operative details. He must have control of the operative details of the stow.

There is no evidence that this vessel had anything other than one captain saying, "I think there may have been somebody present at the loading, watching the loading." So, there was no duty at the loading port to make sure that this stow had shoring.

Now, the ship comes to the United States. There is some shifting in the stow.

Plaintiff's comment about open and obvious, assuming some preexisting negligence -- although, that may or may not be true -- the point is that it doesn't presume vessel owner's preexisting negligence. In this case it may have been the loading stevedore. But the point is that the vessel comes to the United States with shifted stow. Does that create an unreasonable risk of harm?

I will go back to that argument. The answer is no, there is absolutely no evidence that that created an unreasonable risk of harm to experienced longshoremen.

There is no testimony that the custom in the loading ports was any different anywhere else. That is, foreign stevedores loaded the vessel. There is no evidence that foreign stevedores did not load the vessel, no evidence that the vessel had any control of the operative details of stowage.

Finally, as the Court pointed out earlier, there is no evidence that the

actions of the longshoremen in dealing with shifted stow were, as Scindia puts it, obviously improvident. As Griffith puts it, there was no anticipation of the shipowner that the actions of the stevedore were going to be negligent.

The only evidence that this Court heard was that there was shifted cargo, something that they approach routinely in their job, or at least not infrequently, and that a bundle fell for reasons that only the Lord knows at this point because there was no evidence to say why it fell. And I would repeat my argument that that is just simply too sparse evidence to go to a jury.

Thank you.

MR. SOVEL: Your Honor, may I make a couple comments?

THE COURT: Yes, if it is new or different.

MR. SOVEL: Yes, Your Honor.

First of all, Hurst and Rich, referred

to by Mr. Berry, are cases that preceded Scindia. But more important -- and it goes to what I think is really the fundamental issue that is involved here -- they involved the extent to which the shipowner had a duty to intervene in the actions of the import stevedore, the plaintiff's employer. If you go back to Mr. Berry's comments, the real issue in this kind of case is where a shipowner goes to another port, the loading port in this case. To what extent can the shipowner escape responsibility for the condition of its cargo or the hold of its vessel by saying this was the negligence of the stevedore?

The responsibility for the negligence of the unloading stevedore in the discharge situation is somewhat different than the nature of the shipowner's responsibility for the action of the plaintiff's employer, who has separate duties to the plaintiff.

After all, if you carried Mr. Berry's

comments to the logical conclusion, the shipowner in the foreign port could totally ignore what the foreign stevedore does, no matter how dangerous a condition he would create, and say, "Well, we were relying on the foreign stevedore and we have no duty to intervene in what he does."

I would submit to Your Honor, and I think it is inherent in Felton and in many other cases, as well, that while there may be or may not be -- and it really hasn't been resolved in any clear authority, whether the shipowner has a duty of continuing to monitor the work of the loading stevedore. He at least has the responsibility to know what is happening with respect to the conduct of that loading stevedore and, in fact, does know how the cargo is being loaded, because we know, for instance, that if that stevedore were to load the cargo in such a manner as to upset the stability of the vessel, the shipowner

would not be permitted to say, well, he didn't inspect to see that he had put the stuff where it should be, instead of putting all the steel on one side and all the feathers on the other side.

That is really the origin of the duty of the shipowners to observe what is happening. It is not necessarily to observe all the details but, when they observe the cargo being loaded, to be sure that it is going to arrive in a good condition and that it will be done in a manner which will allow the unloading stevedore to work with reasonable conditions.

When you are dealing with cargo cases, the time to be negligent or not be negligent is when the cargo is loaded, because you can't correct it later on.

THE COURT: All right.

Those are arguments and I think they are all embodied in these cases we have.

MR. SOVEL: So I think that, when you

have a situation where you have evidence that the shipowner knows or should know that shoring was not used and that, as a result the failure to use shoring an unsafe condition developed in the hold, that because of the shifting of the cargo which then confronted the discharging stevedores, and there wasn't anything they could do to unshift it at that point, that is the heart and soul of the McCarthy case and it is sufficient to go to the jury.

THE COURT: All right.

Well, I disagree.

Motion granted.

Thank you.

I will discharge the jury.

MR. SOVEL: Your Honor, may I, because I want to be clear on the record here, because we have had such a broad discussion here, is it your finding that there is no evidence that the shipowner knew that there was an unsafe condition? Is that the basis

of your holding?

THE COURT: No, I gave my holding. I will rest on what I said.

You can ask Mr. Kieslich for a copy.

MR. SOVEL: I'm not asking that.

THE COURT: I don't want to restate it. Then you will say, "You said this here and you said that there, but you didn't use that term here."

I have made my ruling. I have heard your arguments and I have given the cases that I think apply, and I have given what I think are the grounds for it. I don't want to remember verbatim what I said and I don't want to repeat it and perhaps use a word that is different.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERR, WILLIAM	:	CIVIL ACTION
V.	:	
KAWASAKI KISEN K.K.	:	NO. 85-5250

CIVIL JUDGMENT

Before Bechtle, J.

AND NOW, this 2nd day of December, 1986,in accordance with this Court's ruling in open Court on defendant's motion for a directed verdict under Rule 50,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant, Kawasaki Kisen K.K. and against the plaintiff, William Derr.

BY THE COURT:

ATTEST:
Deputy Clerk

Entered: 12-3-86

Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS ROBERTSON	:	CIVIL ACTION
v.	:	
TOKAI SHOSEN K.K.	:	NO. 86-2620

MEMORANDUM

Newcomer, J. January 16, 1986.

I have before me defendant's motion for a directed verdict pursuant to Federal Rule of Civil Procedure 50(a). I have considered the arguments of counsel carefully, the submissions of counsel, and I have also reviewed the statute and the cases, and I conclude that the motion should be granted.[1]

The central questions are (1) whether the vessel's responsibilities regarding stowed cargo differ from the responsibilities regarding the ship itself, its equipment and work space; and (2) if the vessel's

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1. This Memorandum and Opinion was originally delivered from the bench on January 7, 1987.

responsibilities do differ, how so?

The factual evidence in the case is fairly simple. On May 17, 1983, the plaintiff was employed as a longshoreman by the Delaware Operating Company, an independent stevedoring contractor. Delaware Operating Company had been hired by the defendant to discharge cargo from the M/V Georgia Rainbow in the Port of Philadelphia. Plaintiff was a member of the longshore gang that was assigned to discharge cargo of steel products, including steel wire coils, from the No. 1 hatch.

Plaintiff was injured shortly after he entered the hold at 8:00 o'clock a.m. He was down among the coils, either preparing to start work or having just begun, when one of the coils fell from the top of the stow, striking him in the neck and back, and injuring him. The plaintiff contends that the steel coil was improperly stowed and was unstable and that it was either not lashed

at all, or it was improperly lashed. As a result, the plaintiff claims that the vessel's owner was negligent in causing or permitting the steel wire coils to be improperly stowed and in failing to warn the plaintiff of the unsafe condition of the stow before the plaintiff entered the hold. While the plaintiff presented evidence that the vessel did a cursory visual inspection of the cargo before the commencement of discharge operations, there is no evidence that defendant had actual knowledge of any unreasonable hazard presented by the cargo.

Plaintiff brought this lawsuit under section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b). The statute provides in part as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of the vessel, then such person, or anyone else otherwise entitled to recover damages by reason thereof, may bring an action against the vessel.

Now, the Act also precludes tort recoveries by longshoremen against the stevedoring company but provides that the stevedore pay workers compensation. As the Supreme Court pointed out in the leading case in this area, Scindia Steam Navigation Company v. De Los Santos, 451 U.S. 156, at 165, and especially in note 13, the statute abrogated the historical right of a longshoreman to recover against the vessel for injuries without regard to the fault of the vessel, and substituted the requirement that recovery could be had against the vessel only if the vessel was at fault. In exchange, the workers compensation available from the stevedore to the longshoreman was greatly enhanced. Courts are therefore required to construe the duty of the vessel in a manner consistent with the fault-based principles contained in the Act.

The Scindia case discusses the duty owed by the vessel to the stevedores and

longshoremen. It is important to keep in mind while reading that case, and also the Third Circuit case of Griffith v. Wheeling Pittsburgh Steel, 657 F.2d 25 (3d Cir. 1981), that both of those cases involve aspects of the ship's equipment and not the cargo on board. The Scindia case states the general rule as follows:

> The vessel owes to the stevedore and his longshoremen employees the duty of exercising due care under the circumstances. This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger

> which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to the longshoreman. Petitioner concedes as much. It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injuries a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.

In short, and somewhat roughly, the vessel has a duty to make the ship itself and the equipment reasonably safe for an expert stevedore, and it has a duty to warn regarding other hazards on the ship.

Those aspects of the ship to which the duty of the vessel attaches -- the ship itself, equipment, gear, tools and work space -- all are generally under the direct control of the vessel. Therefore, failure to take reasonable precautions by the vessel with respect to those items can fairly be said to constitute negligence by the vessel.

Cargo is different. While the vessel

has operational control over itself and its equipment and deck, it does not have the same level of actual operational control over the stowage of cargo. Rather, vessels hire stevedores -- experts in the stowage and handling of cargo -- precisely because of their expertise. As Scindia clearly points out, the law recognizes the stevedore's expertise in this field, and 33 U.S.C. Section 941 requires the stevedore-employer to provide a safe workplace for longshoremen, even within the holds of ships. Indeed, Scindia goes farther and holds that in most circumstances the vessel can rely on the stevedore's expertise. The vessel is thus not required to inspect or supervise the stevedore's operation. The Scindia court recognized that to hold otherwise could revert to the principle of liability without fault which was rejected in Section 5(b) of the Act. 451 U.S. at 169-70.

Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more find the vessel liable for wrongs of the on-loading stevedore -- assuming for the moment that such wrongs were committed. On the other hand, if the vessel has actual knowledge of an unreasonable hazard in stowage or otherwise, it has a duty to inform the stevedore, especially if the hazard is latent. And if the vessel observes the stevedore or its longshoremen acting in a clearly improvident manner regarding a hazard known by the vessel to present an unreasonable risk of harm, the vessel has a duty to intervene. Scindia, 451 U.S. at 175-76. But these principles do not apply in this case. Where, as here, the vessel relied on the loading stevedore in Japan, and there is no evidence that the vessel knew or had any reason to know of a hazard allegedly presented by the means of stowage by the

Japanese stevedore, the vessel simply did not breach any duty of reasonable care. The vessel itself was not negligent.

If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate Scindia and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation, Scindia, it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity.

The cases from the Fourth, Fifth and Ninth Circuits which treat cargo in the same manner as ship's equipment are not true to the principles enunciated in Scindia and mandated in the statute. Statements such as those contained in Turner v. Japan Lines Inc., 651 F.2d 1300, 1304 (9th Cir. 1981) demonstrate pursuit of the laudable

goal of fairness, but at the expense of the law as Congress enacted it. The courses charted by those courts may or may not lead to a greater equity, but I believe they are simply not the law. I therefore enter the following order.

ORDER

AND NOW, this 16th day of January, 1987, it is hereby Ordered that defendant's motion for a directed verdict pursuant to Federal Rule of Civil Procedure 50(b) is GRANTED. Judgment is entered in favor of the defendant and against the plaintiff.

AND IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS ROBERTSON	:	CIVIL ACTION
v.	:	
TOKAI SHOSEN K.K.	:	NO. 86-2620

CIVIL JUDGMENT

Before Hon. Clarence C. Newcomer,

AND NOW, this 7th day of January, 1987, in accordance with the Court granting defendant's motion for directed verdict,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant, Tokai Shosen K.K. and against the plaintiff, Thomas Robertson.

BY THE COURT:

ATTEST: /S/ Thomas Garrity
Deputy Clerk

FILED

Jan 07 1987

MICHAEL E. KUNZ, Clerk

Excerpts from Legislative History of

LONGSHOREMEN'S AND HARBOR WORKERS'

COMPENSATION ACT AMENDMENTS OF 1972

Reproduced from

HOUSE REPORT NO. 92-1441

as set forth in 1972 U.S.Cong. & Adm. News

Vol. 3, pages 4701 - 4705

ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all

cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employers covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with Seas Shipping Co. v Sieracki 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also

available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the Sieracki case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in Ryan Stevedoring Co. v Pan Atlantic S.S. Corp., 350 U.S. 124

(1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the Sieracki and Ryan line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry

witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have re-

sulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen

and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him

with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. Crumedy v. The J. H. Fisser, 358 U.S. 423, Albanese v. Matts, 382 U.S. 283, Skibinski v. Waterman SS Corp., 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A. N. G. Stevedores v. Ellerman Lines, 369 U.S. 355, Blassingill v. Waterman SS Corp., 336 F.2d 367; for gear or

equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, Alaska SS Co. v. Peterson, 347 U.S. 396, Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman

slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation -- just as they

are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the Ryan case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness

doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without

limitation, theories based on contract or tort.

Under the proposed amendments the vessel may not be contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S.S. Yaka, 373 U.S. 410 (1963) and Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in

the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that con-

nection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third

party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

Supreme Court, U.S.
FILED
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NO. 87-1550

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DERR,

Petitioner

v.

KAWASAKI KISEN K.K.,

Respondent

THOMAS ROBERTSON,

Petitioner

v.

TOKAI SHOSEN K.K.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COUNTER-STATEMENT OF THE CASE

A. *Procedural Background*

The Petition accurately states the procedural background of the cases.

B. *Factual Background*

For purposes of deciding the propriety of review of the Third Circuit Court opinion in these matters only, respondents agree the Petition accurately states the factual background of the cases.

II. ARGUMENT

A. *The Petition Should Not Be Granted Because There Is No Conflict Among The Circuits As To The Controlling Legal Principles.*

The legal standard which has governed the rulings of the Courts of Appeals and the District Courts with respect to the duty owed a longshoreman by a vessel owner during cargo operations has developed in a logical and consistent manner following this Court's opinion in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Indeed, the differences which petitioners wish to create between the opinions of the Ninth Circuit Court in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), and the Fifth Circuit Court in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), on the one hand, and the Third Circuit Court opinion in these cases on the other ignores factual distinctions among the cases and the subsequent decision of the Ninth Circuit Court in *Taylor v. Moram Agencies*, 739 F.2d 1384, (9th Cir. 1984), limiting the scope of the *Turner* holding.

Although the Third Circuit Court below rejected the "analysis" of the Ninth Circuit Court in *Turner*, the Court also distinguished *Turner* on its facts. Unlike *Turner*, the *Derr* and *Robertson* cases presented no evidence that the vessel owner exercised any control or supervision over the loading of the lumber and/or steel coils which allegedly injured the respective longshoremen. (3a). Moreover, there was no evidence of any custom at the respective loading ports which would have

required the Masters or crew to be responsible for supervising cargo operations. (8a-9a).

Petitioners' reference to the holding in *Turner* is also notable in its failure to include one operative word: "concealed". (14a). The Ninth Circuit Court in *Turner* held "that the vessel had a duty to protect the plaintiff against *concealed* dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." (emphasis added; footnote omitted), 651 F.2d at 1304. In fact, the Third Circuit Court below noted that the Ninth Circuit has limited *Turner* to concealed dangers, (11a), citing *Taylor v. Moram Agencies*, 739 F.2d 1384, 1387 (9th Cir. 1984). The conditions which allegedly caused the injuries of *Derr* and *Robertson* were not concealed. The condition of the stowed lumber in *Derr*, specifically the fact that it had shifted and was stowed without shoring, was open and obvious to the longshoremen when they entered the vessel's hatch. (4a). Likewise, any movement of the steel coils in *Robertson* was apparent to all who entered the hatch upon the vessel's arrival in the port of Philadelphia. (11a).

The open and obvious nature of the condition of the cargo in these cases also distinguishes them from *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981). In *Lemon*, the Fifth Circuit Court held that the vessel could be held liable for injuries to an injured longshoreman if it had actual knowledge of the improper loading technique and failed either to correct it or warn of it. In *Derr* and *Robertson*, there was no evidence owners had actual notice of any improper loading technique, and any warning was obviated by the longshoreman's appreciation of the condition of the stow at the commencement of stevedoring operations.

B. *The Petition Should Not Be Granted Because There Is No Conflict Between The Opinion Below And The Principles Set Forth In The Legislative History Of The 1972 Amendments To The Longshoremen's And Harbor Workers' Compensation Act.*

Contrary to the position advanced by petitioners, the Third Circuit Court in these cases fully considered the legislative history of the 1972 Amendments and the Court's opinion is consonant with the principles set forth therein. (4a-7a). The legislative history cited in the petition of Derr and Robertson omits a relevant and somewhat lengthy discussion by the House Committee on Education and Labor (18). In that discussion, the Committee "rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by [longshoremen]." (76a). The Committee also rejected imposition of absolute liability on the part of vessels to longshoremen injured on the vessel and opined that any "liability of vessels as third parties, . . . be predicated on negligence". (78a-79a).

Petitioners' argument that the prohibition on holding a vessel vicariously liable for a stevedore's negligence is somehow limited to the negligence of the injured longshoreman's employer is disingenuous and belies the principles underlying the 1972 Amendments. Petitioners would readily admit that a vessel has no duty to supervise cargo operations of their employers, loading stevedores in Philadelphia; and yet, they would seek to hold the vessels responsible for injuries sustained by longshoremen at the subsequent ports of call, for any dangerous condition created by the Philadelphia stevedores. Petitioners offer no genesis for the duty owed to the longshoremen in the subsequent ports and the legislative history to the 1972 Amendments offers no support for such a duty.

Petitioners' position that such a duty exists is born of necessity because of the presumed impediments in

bringing a cause of action against a foreign loading stevedore. Imposing vicarious responsibility on the part of the vessel for the negligent acts of a foreign stevedore in order to overcome those impediments, however, is patently at odds with the intent of Congress in enacting the 1972 Amendments. The Third Circuit Court below agreed with the trial judge in *Robertson* that to adopt petitioners' view would " 'eviscerate' *Scindia* and the Act: 'while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the stow.' " (10a). The Third Circuit Court's approach is therefore fully consonant with the principles set forth in the legislative history to the 1972 Amendments.

Finally, petitioners' reliance on §412 of the Restatement (Second) of Torts is also misplaced. It simply does not apply, nor was it ever intended to apply, to cargo. *Moser v. Texas Trailer Corporation*, 623 F.2d 1006, 1015, (5th Cir.), *reh'g. denied*, 630 F.2d 249 (1980), *appeal after remand*, 694 F.2d 96 (1982). Moreover, this Court has specifically eschewed reliance on the Restatement (Second) of Torts in suits by longshoremen against vessel owners both because the legislative history conspicuously omitted reference to it and because land-based legal principles are of limited guidance in the maritime context. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 154, 167 n.14 (1981).

C. *The Petition Should Not Be Granted Because The Third Circuit Opinion Below Is Consistent With* Scindia Steam Navigation Co., Ltd. v. De Los Santos *With Respect To The Effect Of Custom In The Maritime Industry On The Vessel's Duty Of Care.*

The duties which a shipowner owes to longshoremen set forth by this court in *Scindia*, did *not* include a

duty to supervise cargo operations because the shipowner is entitled to rely on the stevedore to perform its work competently. 451 U.S. at 172. An injured longshoreman could offer evidence of "custom", however, to alter the general scheme of no duty. Petitioner-Derr has argued that the Third Circuit Court failed to recognize the "custom" exception.

Contrary to Derr's assertion, the Third Circuit Court acknowledged Derr offered evidence suggesting a crewmember may have been present during the loading operation. The Third Circuit Court correctly recognized, however, that evidence of such "custom" cannot be used to saddle the shipowner with a general duty to supervise the work of the loading stevedore. The Court observed: [w]e agree with the District Court that such observation of cargo operations by the crew cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability." (citations omitted) (9a).

At trial, the District Court's rejected Captain Ouidyk's testimony in *Derr* because of his lack of knowledge concerning "custom" in the loading ports. The District Court also observed that any evidence that vessel's officers routinely observed cargo operations is not sufficient to give rise to a general duty to inspect all cargo operations on board the vessel in derogation of the duty set forth in *Scindia*.

In its opinion below, the Third Circuit Court took that analysis one step further and indicated that, even assuming there was a general custom in the maritime industry which included observation of cargo operations by the crew, such evidence is insufficient to establish the type of control necessary to affix liability on the vessel owner. *Hurst v. Triad Shipping Company*, 554 F.2d 1237, 1249 n.35 (3rd Cir.), *cert. denied*, 434 U.S. 861 (1977). The Third Circuit therefore concluded that, assuming Ouidyk's testimony was sufficient evidence of

"custom", the "custom" established by Ouidyk was not of the nature to impose any general duty on the part of the vessel to supervise and control the activities of the loading stevedore. There is nothing in the Third Circuit Court opinion which is inconsistent with the principles set forth in *Scindia* as it relates to custom.

D. *The Third Circuit Opinion Below Is Consistent With* Scindia's *Reading Of The Vessel's Duty With Regard To Work Space On The Vessel.*

Petitioners' seek to reverse the entire holding of *Scindia* by redefining the term "work space" to include cargo loaded into the ship by an independent contractor. This is a clear example of the tail wagging the dog. Creating a duty on the part of the shipowner for cargo stowed in the hold of the vessel because, once stowed, the cargo would become part of the "work space" for the next port's stevedore, is simply recasting the arguments set forth in sections I and II of petitioners' Brief in another light. Respondents therefore rely on their responses to those arguments.

Moreover, *Harris v. Flota Mercante Grancolombiana S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Gill v. Hongo Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), offer petitioners no assistance. *Harris* involved a claim of defective stow of coffee beans loaded by the vessel's crew; no independent stevedore was hired to perform cargo operations at the loading port. 730 F.2d at 299. *Gill* also involved cargo loaded by the ship's crew. 682 F.2d at 1072, 1075. The duties of the vessels in *Harris* and *Gill* were based on actions by shipowners which were contrary to the customary method of employing independent expert stevedores for cargo operations. The *Harris* and *Gill* holdings did not arise from inclusion of cargo in the term "work space", but rather from a finding of active involvement in cargo operations by the vessel's crew, which involvement may have been done negligently.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Kevin F. Berry, Esquire and Carl D. Buchholz, III, Esquire, attorneys for respondents certify that they served a copy of this Joint Brief in Opposition to Petition for Writ of Certiorari upon Petitioners' attorney, Charles Sovel, Esquire, Lafayette Building, 8th Floor, 5th & Chestnut Streets, Philadelphia, Pennsylvania 19106 on the 15th of April, 1988, by regular U.S. Mail.

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REPLY TO JOINT BRIEF IN OPPOSITION

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REPLY TO JOINT BRIEF IN OPPOSITION

Respondents would have this Court believe that there is no conflict between the decision below and the cases from the Fourth, Fifth and Ninth Circuit cited in

the Petition, despite the fact that both the trial judge in Robertson (89a-90a) and the Third Circuit (11a) acknowledged that there was a conflict.

Respondents attempt to distinguish Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), on the ground that the dangerous condition in Turner was "concealed", whereas, in the instant cases, the shifted condition of the cargo was "open and obvious". This factual difference, however, does not relate to the shipowner's duty of inspection; rather, it goes to the argument which was rejected in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 178-179, 81 L.Ed.2d 1, 19-20 (1981), that the shipowner's duty of reasonable care should be limited to the giving of warning of an unsafe condition.

Taylor v. Moram Agencies, 739 F.2d

1384 (9th Cir. 1984), did not limit the Turner holding on the duty of inspection. Rather, it held that, in those situations in which the vessel's duty of care could be fulfilled by the giving of a warning, it would not be necessary for the vessel to give a separate warning if the unsafe condition was obvious, see 739 F.2d at 1387.

This Court, in Scindia, rejected the argument that the shipowner's duty should be limited to only having to give warning of an unsafe condition, and, instead, held that the vessel would have a duty to take corrective action if the circumstances were such that the vessel knew or should have known that the longshoreman's stevedore employer was not taking action to remedy an unsafe condition, Scindia, supra, 451 U.S. at 172-179, 68 L.Ed.2d at 16-20. This part of the Scindia holding gives rise to what is a recurring problem

in cases, such as the two instant cases, which involve the shifting of cargo as a result of improper stowage.

It is not possible for a discharging stevedore to "unshift" cargo which has shifted without being imperiled by the same dangers as would be encountered in discharging that cargo. If, as frequently is the case with shifted cargo, the danger is one which the unloading stevedore can not remedy, then the shipowner can not validly claim that it was relying on the unloading stevedore to correct that condition. In these circumstances, the giving of warning, or the fact that the condition was "open and obvious", does not satisfy the duty of reasonable care. This type of situation was before the Fourth Circuit, in Gill v. Hango Ship-Owners/AB, 682 F. 2d 1070 (4th Cir. 1982), with the Court holding that the shipowner would be liable for unsafe stowage, even if open and obvious,

if the danger was one which the shipowner could not reasonably have anticipated that the unloading stevedore would be able to avoid. The Fourth Circuit noted, 682 F.2d at 1074-1075:

> There is evidence that the manner in which the cargo was stored precluded the stevedore from unloading it by any other means except one which was inherently dangerous. If so, this is not a case in which the stevedore failed to use reasonable care but, in effect, one in which the shipowner was the only party at fault. In other words, the jury could reasonably find that Hango should have anticipated the harm because the stevedore was unable to remedy the dangerous condition (Emphasis supplied)

Respondents effort to distinguish Turner on the grounds that it involved a concealed defect thus serves only to demonstrate an additional conflict between the decision below and the Fourth Circuit's decision in Gill.[1]

---

1. Respondents also assert that the Third Circuit distinguished Derr and Robertson from Turner on their facts in that "unlike Turner", Derr and Robertson "presented no evidence that

Respondents contention that the Fifth Circuit's decision in Lemon v. Bank Lines, Ltd., 657 F.2d 110 (5th Cir. 1981), is

(Footnote 1 continued)

> the vessel owner exercised any control or supervision over the loading . . ." [of the cargo]. However, respondents do not point to where, in the Turner opinion the Ninth Circuit found that the shipowner in that case had exercised control or supervision over the loading, and one will search in vain in the Turner opinion for any indication that this was, in fact, the case. Rather, the evidence in Turner, as in the instant two cases, was that the cargo had been loaded and lashed by independent stevedores, see Turner, supra, 651 F.2d at 1301.
>
> Respondents assertion that there was no evidence in the instant cases of "any custom at the respective loading ports which would have required the Masters or crew to be responsible for supervising cargo operations." This is a misstatement of the record below. On the contrary, there was specific testimony by petitioner's maritime expert in the Derr case of such a custom or practice -- testimony which was similar to that offered on behalf of the plaintiff in Turner. The problem in the instant case is not the lack of such testimony, but rather that the trial judge, in Derr, rejected this testimony, thereby creating one of the conflicts which is the subject of the instant Petition (8a-9a, 25a).

distinguishable because, in the instant two cases, there was no evidence that the shipowner had "actual notice of any improper loading technique," is contradicted by the record in the instant cases. In Derr, there was evidence of the practice of the crew to observe loading operations (41a), and in Robertson there likewise was evidence of inspections by the ship's crew (15a-16a), evidence from which the juries could have found that the shipowner should have been aware that the cargo had not been adequately secured.

Respondents next contend that the legislative history precludes imposing liability on shipowners for unsafe conditions which are created in a manner other than by the shipowner's own active negligence. Respondents wrongly characterize such liability as a form of "vicarious" liability when, in fact, it simply is liability for one's own negligence arising

from breach of the duty of inspection.

Respondents' interpretation of the legislative history would eliminate vessel responsibility for any unsafe condition not resulting from the shipowners own active negligence, thereby eliminating all liability arising from a duty of inspection. Such an interpretation is contrary to this Court's decision in Scindia, supra, which recognized and defined the shipowner's duty of inspection, see 451 U.S. at 166-172, 68 L.Ed.2d 12-15, and would be contrary to the intent of Congress to retain vessel responsibility for unsafe conditions which were in existence long enough to have been discovered and removed by the vessel (100a-101a).

Respondents' effort to distinguish the decisions in Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984), and Gill v. Hango Ship-Owners/AB, supra, on the grounds that in

those cases there was active involvement of the crew in the loading operation is not borne out by the opinions in those cases. There is no indication in either the Harris or Gill opinions that the crews in those cases actively participated in loading the cargo. In Harris there simply was no evidence that the cargo had been loaded by an independent stevedore, see 730 F.2d at 299, f.n. 2. The vessel's liability in Harris was predicated on the vessel's knowledge of the unsafe condition of the cargo, not on any claimed active involvement of the crew in loading the cargo, see 730 F.2d at 299. In Gill there was no evidence one way or the other as to who loaded the cargo.

The various arguments set forth in the Joint Brief in Opposition do not negate the existence of the conflicts between the decision below and the cited decisions from the Fourth, Fifth and Ninth

Circuits. Respondents' efforts to distinguish the cases from the other Circuits serve only to emphasize how deep and real is the conflict, and how far the court below has strayed from this Court's decision in Scindia and from the decisions of the other Circuit Courts of Appeals in the cases cited in the Petition. Accordingly, it is respectfully submitted that a Writ of Certiorari should issue so that these conflicts may be resolved and national uniformity restored to the maritime law.

Respectfully submitted

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